for the purpose of applying the same for the use and benefit of the owner or person, so delivering it, shall fraudulently convert the same to his own use he shall, where the value of the thing so converted is $100 or more, be punished by imprisonment for not less than one nor more than ten years, or by a fine of not more than $1,000, or both; and where the value of the thing so converted is less than $100 he shall be punished by imprisonment for not more than one year or by a fine of not more than $500 or both: *Provided,* That nothing contained in this section shall be construed to alter or repeal any section contained in this chapter. (Mar. 3, 1901, ch. 854, § 851b, as added Mar. 3, 1913, 37 Stat. 727, ch. 108, and amended Aug. 12, 1937, 50 Stat. 629, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, § 215 (g).)

STATEMENT

The indictment of appellants, Earl J. Lombard (hereinafter referred to as Lombard) and Guardian Investment Corporation, (hereinafter referred to as Guardian), charged them with violation of Section 77q(a) of the Securities and Exchange Act of 1933, larceny, larceny after trust and embezzlement arising out of certain stock transactions with nine complaining witnesses. There were, therefore, 36 counts and, since each of the defendants was charged with each offense, a total of 72 counts in the indictment. All of the offenses were alleged to have been committed between May 1, 1961 and March 1, 1962.

During the period from December 30, 1960 to April 30, 1962, Guardian took in $208,634.63 from customers (552) and paid out $181,538.60 to customers (553). The money involved in the transactions covered by the indictment amounts to $7,625.00 (755). (All references herein are to the reporter's transcript of proceedings in the Trial Court).

At the conclusion of the government's case both defendants moved for a judgment of acquittal on all counts (939). The motions were denied (966).

At the end of the trial, the motions were renewed by defendants (1161). The Court again denied the motions (1177).

In instructing the jury, the Court said, *inter alia,*

> "Ordinarily, intent cannot be proven directly, as it is not humanly possible to read or see the operations of the mind of another human being. Ordinarily, therefore, intent must be inferred from the circumstances, from the nature of the act done; and a person is presumed to intend the natural and probable consequences of his act."

One hour and a half after the jury had retired, the jurors sent a note to the judge saying, "Title 15, United States Code, 77q(a). 22 D. C. Code, 1202, 2201 and 2203. Please furnish the above to this jury." Typed pertinent excerpts from the statutes were supplied to the jury by the Court over objection by the defendants.

Both defendants were found guilty of violation of the Security and Exchange Act and of embezzlement.

Both defendants moved for judgment of acquittal N.O.V. or for a new trial and these motions were denied.

On appeal to the Court of Appeals for the District of Columbia Circuit, the Court, per curiam, entered an Order affirming the judgment below. A petition for a rehearing en banc was denied, per curiam. The Order stated that Judge Skelly Wright would have granted the petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the decision of this Court in *Morrissette* v. *United States,* 342 U.S. 246. In that case Mr. Justice Jackson pointed out that "the trial court may not withdraw or prejudge the issue by an instruction that the law raises a presumption of intent from an act." (274)

> "A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary." (275)

2. The decision of the Court of Appeals is in conflict, without distinction having been drawn, with its own decision in *Anzoategui* v. *United States,* (1964) — U.S. App. D.C. —, 335 F. 2d 1000, in which the Court said:

> "As in Morrissette, there was no doubt about the taking. Appellant contended throughout that there had been no evil intent. But our trial judge instructed the jury that the appellant's 'intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act.' That axiom, true enough in so many situations, is certainly no substitute for a finding by the trier

of guilty intent when, as here, intention is in fact and in law an ingredient of the offense charged." (1002, n. 9).

3. The decision of the Court of Appeals is in conflict, without distinction having been drawn, with its own decision in *Byrd* v. *United States,* (1965) — U.S. App. D.C. —, 342 F. 2d 939, in which the Court held that an instruction on robbery, which included only a reading of the robbery statute was not sufficient since the statute does not set forth all the essential elements of the offense. The Court said: "It was fundamental error to send the case to the jury without instructions as to the elements of the offense which the government must prove beyond a reasonable doubt before a verdict of guilty can be returned." Even though in petitioners' case the Court had earlier instructed on criminal intent, the reasoning in *Byrd* should apply here since the jury had been out for an hour and a half, had asked only for the statutes and received only the statutes.

4. The decision of the Court of Appeals is in conflict with a decision of the Court of Appeals for the 7th Circuit in *United States* v. *Donnelly* (1950), 179 F. 2d 227, in which that Court held that where two instructions are given to the jury one erroneous and prejudicial, and the other correct, (as here) since it is impossible to tell which one the jury followed, the erroneous and prejudicial instruction constituted reversible error. It is submitted that this Court should make this rule universal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BYRON N. SCOTT
Attorney for Petitioners

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

Criminal 471-63

No. 18,725

EARL J. LOMBARD, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Criminal 471-63

No. 18,748

GUARDIAN INVESTMENT CORPORATION, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Before: EDGERTON, Senior Circuit Judge, and DANAHER and BURGER, Circuit Judges

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia and were argued by Counsel.

ON CONSIDERATION WHEREOF it is Ordered and Adjudged by this Court that the Judgment of the District Court appealed from in these cases is Affirmed.

Per Curiam

Dated March 16, 1965